GOH ENG CHYE v. AMALGAMATED LUMBER SDN. BHD.

[F.C. (Lee Hun Hoe C.J. Borneo, Wan Suleiman F.J. and Yusoff Mohamed J.) March 6 & 7; May 26, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 54 of 1979]

Labour Law – Employment – Injuries to workman – Workman employed by contractor in factory – Breach of statutory duty – Contributory negligence – Apportionment of liability – Factories and Machinery Act, 1967, s. 10(f)(a).

In this case the appellant was employed by a contractor to work as a sawyer in the respondent's factory. The appellant tried to remove a piece of bark which was stuck at the gap on the bandsaw table with a stick. While he was doing so a log fell from the stacking lock bench hitting his right elbow and causing his right hand to come into contact with the bandsaw blade. He sustained injuries necessitating amputation of his right thumb. The learned trial judge found that as the appellant was not employed by the respondents he could not claim damages under common law. However he found the respondents liable for breach of statutory duty under section 10(f)(a) of the Factories and Machinery Act, 1967, in that the goods were not properly stacked in a manner so as to ensure stability. He awarded $15,000 for general damages, $1750/- for loss of earnings and $10,632/- for future loss of earnings. He however held that the appellant was to blame for not switching off the machine before removing the impediment and for using a stick to remove the obstructing bark while the machine was in motion. He assessed that the appellant was 80% to blame and respondents 20% to blame. The appellant appealed.

Held: (1) the learned Judge erred in principle in putting so harsh a blame on the appellant. The accident was caused by the respondents because of a breach of statutory duty in not stacking the logs properly in a manner to ensure stability. The evidence did not show that the appellant was careless or inattentive and further in this case there was no guard to cover the exposed saw;

(2) even if the appellant had been careless or inattentive such conduct could not, in the light of the authorities, constitute contributory negligence in this type of case;

(3) the very purpose of imposing absolute obligation on employers under the Factories and Machinery Act, 1967, is to protect the workman against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute;

(4) an appellate court should be slow in interfering with the trial judge's apportionment of liability save in exceptional circumstances. Having regard to all the factors including the object of the Factories and Machinery Act, 1967, this is one of the exceptional cases where the Appeal Court should interfere. The appellant should be held to be 25% to blame and the respondents 75% to blame.

Cases referred to:–

(1) *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152, 166.
(2) *Tay Cheng Teck* v. *Tropical Produce Co. Pte. Ltd.* [1971] 2 M.L.J. 247.
(3) *Uddin* v. *Associated Portland Cement Manufacturers Ltd.* [1965] 2 All E.R. 213.

FEDERAL COURT.

Tee Eng Tuan for the appellant.

R.K. Menon for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering Judgment of the Court): We allowed the appeal on apportionment of liability and stated we would give our reasons later. We do so now.

Appellant worked as a sawyer in respondents' factory. On 18.12.72 appellant tried to remove a piece of bark which was stuck at the gap on the bandsaw table with a stick. While he was doing so a log fell from the stacking log bench hitting his right elbow and causing his right hand to come into contact with the bandsaw blade. He sustained injuries necessitating amputation of his right thumb. According to the medical report the movements of his wrist and the joints of his fingers are grossly limited. He also suffered loss of sensation in the palmar aspect of the index and the little finger. He has neither fine finger movements nor power grip. All these disabilities will be permanent.

Appellant claimed to be the servant of respondents who denied that appellant was his servant. Respondents alleged that appellant was in fact employed by a contractor working for respondents. Indeed, during cross-examination appellant explained at page 20 of the appeal record that:–

"Four of us work in one team. I am the chief. One at the back, one end of the log. One at the back of band saw. He is to receive the sawn timber. Another person carries the finish product and stacked them away to another place. No wood or plank is let to fall near the band saw."

At page 22 he went on to say:–

"Low Kim Yoke is the kapala. Toh Ah Chin is my workmate. Wages are paid to Toh Ah Chin. Toh Ah Chin distribute my share of 38%. This 38% is agreed between me and Toh Ah Chin. Toh Ah Chin gets 34%. The other one get 28%. The other gets contract wage. Three of us employed him. He carried the timber to the stack."

On the evidence the learned Judge was right to hold that appellant was not employed by respondents so that he had no ground to claim damages under common law. However, he found respondents liable for breach of statutory duty under section 10(f)(a) of the Factories and Machinery Act, 1967 in that the goods were not properly stacked in a manner as to ensure stability. In assessing liability he awarded the sum of $15,000/– for general damages, $1,750/– for loss of earnings and $10,632/– for future loss of earnings. He assessed that appellant was 80% to blame and respondents 20% to blame. It is this apportionment that was challenged. It is not in dispute that appellant was also to blame but not to such extent on the evidence. The learned Judge blamed appellant for not switching off the machine before removing the impediment. He thought that the failure to take this simple precautionary measure resulted in his getting involved in the accident. He considered appellant to be careless in using a stick to remove the obstructing bark while the machine was in motion.

Appellant submitted that the learned Judge was wrong in law and in fact in that he misapprehended the standard of care required under the provisions of the Factories and Machinery Act, 1967. Also, the accident was caused by the manner the logs were stacked resulting in the falling of one of the logs which hit appellant's elbow. On the other hand, respondents contended that the learned Judge had not erred in principle in arriving at his decision.

Numerous cases were cited by the parties. We do not think it is necessary to refer to all the cases. With respect, we consider the learned Judge to have erred in principle in putting so harsh a blame on appellant. The accident was caused by respondents because of breach of statutory duty in not stacking the logs properly in a manner as to ensure stability. This was the finding of the learned Judge. The evidence did not in any way show that appellant was careless or inattentive. Further, appellant alleged that there was no guard to cover the exposed saw. If there was such a guard

the accident could have been avoided. To a question put by respondents during cross-examination appellant stated there was no guard at the time of accident. Respondents did not adduce any evidence to show that there was a guard. He could easily call someone in authority working in the factory to give such evidence. The guard was installed after the accident. So that when the Inspector of Machinery inspected the factory some eleven months after the accident it was there. In answer to cross-examination he admitted he could not say whether on the date of accident there was any guard.

Even if appellant had been careless or inattentive such conduct could not, in the light of authorities constitute contributory negligence in this type of case. Appellant could do nothing when the log suddenly hit his right elbow pushing his right hand towards the bandsaw blade. The use of a stick to remove the piece of bark may be dangerous. But, this does not make him more to blame. Neither was he to blame merely for failing to switch off the machine. Respondents' evidence was that no sawyer would switch off the machine merely to remove a piece of bark. It would take time for the machine to stop. The accident would not have happened if the logs were properly stacked. Of course under the authority of *Caswell* v. *Powell Duffryn Associated Collieries Ltd*(1) it is open to the learned Judge to find an element of contributory negligence in the conduct of appellant. This is so whether the action is based on breach of statutory duty or negligence.

The very purpose of imposing absolute obligation on employers under the Factories and Machinery Act, 1967 is, it seems to us, to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute. Lord Wright made the position very clear when he said at page 179:–

"The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty."

In *Tay Cheng Teck* v. *Tropical Produce Co. Pte. Ltd.*(2) while in the course of duty appellant's right hand got caught between the rollers and was crushed. The learned Judge took into consideration that appellant had been taught to mill the rubber and had been properly instructed in the safe use of the machine. He found appellant to be negligent and that was how the injury was caused to him. He assessed liability at 50%. Compared to this case we cannot see how appellant could be assessed at 80% to blame in the light of the evidence. There was no evidence that appellant was doing any unauthorised act for his own purpose. Neither was appellant negligent as in *Tay Cheng Teck's case.*(2) It was because respondents failed to carry out the statutory obligation to properly stack the logs in a manner to ensure stability that the accident occurred. In *Uddin* v. *Associated Portland Cement Manufacturers Ltd.*(3) plaintiff went to the vicinity of the dust extractor plant where he had no authority to be. While there he tried to catch a pigeon behind a shaft and got caught in the machinery. The learned Judge found plaintiff to be doing an act of incredible folly. Also, he was doing an unauthorised act in an unauthorised place for his own purpose. He awarded plaintiff one fifth only of the damages found. The Court of Appeal upheld his decision. In the light of the evidence and comparing some cases cited we are of the view that it was wrong in principle for the learned Judge to place on appellant's shoulder a far greater weight of a large load of damage. It was unduly harsh to place greater blame on appellant in the circumstances. An appellate court should be slow in interfering with the Judge's apportionment of liability save in very exceptional circumstances. Having regard to all the factors including the object of the Factories and Machinery Act, 1967 we consider that this is one of the exceptional cases where we should come to the aid of appellant. For reasons given, we therefore allow the appeal with costs. We would say appellant is 25% to blame and respondents 75% to blame. Amount of damages assessed by the learned Judge to remain. Deposit to be refunded to appellant.

Order accordingly

Solicitors: *Murphy & Dumbar; R.K. Menon & Co.*

SHELL MALAYSIA TRADING SDN. BHD. v. LIM YEE TECK & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. and Abdoolcader J.) March 24 & May 26, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 194 of 1980]

Contract – Sale of portion of land – Subdivision – Condition that separate titles in continuation for land will be obtained – Vendors unable to obtain separate titles in continuation except on surrender of portion of land used for petrol and service station in exchange for a lease for 30 years. – Termination of agreement – Claim for specific performance and damages.

In this case the appellants agreed to sell to the respondents a portion of their land in Kuala Lumpur. Respondents paid a deposit of 10% and it was agreed that the balance of the purchase price was to be paid within thirty days of the appellant's notifying the respondents of obtaining separate titles in continuation for the land. At the time of the agreement the appellants had already applied for the development of a petrol filling and service station on the land and had applied for subdivision of the land. The appellants were told that their application would be considered only if they surrendered the portion of the land provided for the petrol and service station in exchange for a lease for 30 years. This condition was rejected by the appellants.

The appellant's solicitors thereupon informed the respondents that they were unable to obtain separate titles in continuation and therefore they returned the 10% deposit and considered the agreement to become null and void. The respondents' solicitors disagreed and returned the earnest money. Subsequently the respondents claimed specific performance and damages for breach of agreement. The learned trial judge gave judgment for the respondents and the appellants appealed.

Held: in this case the appellants had done all they could reasonably be expected of them in pursuing their application for subdivision and when their application was not approved, they were entitled to treat the agreement as having come to an end.

Cases referred to:–

(1) *Pengarah Tanah dan Galian* v. *Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 M.L.J. 135.

(2) *Hargreaves Transport Ltd.* v. *Lynch* [1969] 1 All E.R. 455.

(3) *New Zealand Shipping Co. Ltd.* v. *Societe Des Ateliers Et Chantiers De France* [1919] A.C. 1, 9.